In The

UNITED STATES CIRCUIT COURT OF APPEALS

For The Ninth Circuit.

No. 10108

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. MONTGOMERY WARD & COMPANY, Respondent. MONTGOMERY WARD & COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Upon Petition for Enforcement and Upon Cross-Petition for Review and to Set Aside an Order of the National Labor Relations Board.

BRIEF OF MONTGOMERY WARD & CO., INCORPORATED, AS RESPONDENT TO PETITION FOR ENFORCEMENT.

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TABLE OF CASES.

MISCELLANEOUS.

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THE PARTIES.

Hereafter in this brief we shall refer to the petitioner and cross-respondent, National Labor Relations Board, as the "Board"; to the respondent and cross-petitioner, Montgomery Ward & Co., Incorporated, an Illinois cor-

poration, as "Wards"; to the Warehousemen's Union, Local 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, as the "Warehousemen"; to the Retail Clerks' International Protective Association, Local No. 1257, as the "Clerks"; and to the latter two organizations collectively as the "Unions".

THE TERMS USED.

Hereafter in this brief we shall refer to the National Labor Relations Act (an Act of Congress approved July 5, 1935, c. 372, 49 Stat. 449-457, U. S. C. A., Title 9, Sections 151-166) as "the Act"; to all forms of the closed shop, whether called "union shop", "union preference shop", or something else, as the "closed shop"; to the brief which the Board filed with this Court in support of its Petition for Enforcement of an Order of the National Labor Relations Board as the "Board's Brief"; and to the brief which Wards filed with this Court in support of its Cross-Petition for Review and to Set Aside an Order of the National Labor Relations Board as "Wards' Brief as Petitioner".

STATEMENT OF THE CASE.

Nothing need be added here to the Statement set forth in Wards' Brief as Petitioner, except to call the attention of this Court to the many misstatements of fact in the Board's Brief which are discussed in Proposition VIII of this brief.

SUMMARY OF THE ARGUMENT.

Wards contends that the Board's Decision and Order should either be set aside completely or the case reversed and remanded to the Board in order that the errors of law embedded in the Board's Findings and Conclusions be corrected. Wards' position is based on the following points:

1. When an administrative agency misinterprets the statute under which it acts, or when an administrative agency makes errors of law which may have materially affected its findings, or when an administrative agency rests heavily upon a misconstruction of the law or upon unsupported findings, or when an administrative agency weighs the evidence under a mistaken view of the law, or when the findings of an administrative agency leave the reviewing court in doubt as to whether the agency has made its findings under a proper view of the law, the decision and order of the administrative agency should be remanded for further proceedings under a correct view of the law.

2. A remand for such reasons is distinct from the setting aside of an order because the record completely lacks substantial evidence to support it, and such a remand may be ordered even without examination to discover whether the record contains substantial evidence which would support a finding or conclusion made under a proper view of the law.

3. The Board's Decision and Order in the present case are based upon definite misconstructions of the statute in that certain statements and actions of Wards in the course of negotiations are improperly held to amount *per se* to a refusal to bargain.

4. The Board's Decision and Findings show that the Board was attempting to usurp the power of passing upon the reasonableness of the terms upon which Wards was insisting in the course of negotiations, and thus to exercise a managerial authority.

5. The Board's Conclusions rested heavily upon findings which were entirely unsupported or clearly erroneous.

6. Partly as a result of these errors of law, not a single one of the Findings upon which the Board bases its Conclusions is supported by substantial evidence.

In addition to these contentions, we shall point out to this Court that Board's counsel in the Board's Brief have attempted to prejudice this Court by reference to matters which were not introduced into evidence before the Board and which are of such a character as to evidence bias and prejudice on the part of the Board. We also propose to show to this Court that the Board's Brief is replete with misstatements of the facts and misrepresentations of the evidence.

ARGUMENT.

I.

The Power of This Court to Deny Enforcement to Orders of the National Labor Relations Board Because of Errors of Law Is Not Limited to Questions of Lack of Evidence.

The Board's brief in the present case argues as if the sole issue before this Court were whether the evidence substantially supports the Board's findings of fact. This is one of the issues, but it is not the only one and perhaps not the most important. While Wards earnestly contends that the Board's findings completely lack substantial support in the record, Wards also submits that the order should be denied enforcement for other reasons, equally compelling, and possessing far more general importance than the particular questions of fact raised by a single case.

Because of the importance of these other issues, the discussion of them may profitably be prefaced by a consideration of principles which are neither new nor debatable, but which must be constantly remembered in a proper analysis of this case.

The Board's order is of course final "as to the facts, if supported by evidence" (Section 10, paragraphs (e) and (f) of the Act); but this finality no more extends to issues which present questions of law than in the case of orders promulgated by other administrative agencies. The Supreme Court has given us a succinct description of the general types of so-called "questions of law" which are inherent in all administrative decisions:

"Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision."

Federal Radio Com'n v. *Nelson Bros.,* (1935), 289 U. S. 266, at p. 276; 53 S. Ct. 627, at p. 632; 77 L. Ed. 1166.

From this general statement of what are "appropriate questions for judicial review", the following propositions which are pertinent to the present case may be deduced:

A. If the Board incorrectly interpreted the statute administered by it, the order should be set aside.

The interpretation of a statute is obviously a question of law and not a question of fact. Hence the Court which reviews an administrative order is never bound by the interpretation adopted by the administrative agency:

"That there may be some degree of finality in a finding of fact by an administrative body may be conceded, but such finding cannot take from the courts the power to construe a statute and determine whether it covers such a situation as the facts present."

Washburn v. *Commissioner of Internal Revenue,* (8th cir.) 51 Fed. (2d) 949 at p. 951.

"The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made."

Helvering v. *Rankin,* (1935) 295 U. S. 123, at p. 131; 55 S. Ct. 732, at p. 736; 79 L. Ed. 1343.

What Congress meant by the phrase "bargain collectively" is a question of statutory definition; it is a proper subject for judicial decision and administrative determination involving the definition of this phrase is neither final nor binding in this Court. Wards contends that the Board improperly interpreted this phrase, and that present case improperly interpreted this phrase, and that this error of law can only be corrected by setting aside the Board's order.

B. If the Board's ultimate conclusions involved mixed questions of law and fact in which were embedded legal questions improperly decided, the order should be set aside.

The ultimate finding of an administrative agency may involve both a question of fact and an interpretation of the law; such findings are said by the courts to give rise to a "mixed question of law and fact" which is subject to judicial review: *U. S.* v. *Idaho,* (1936) 298 U. S. 105, at p. 109, 56 S. Ct. 690 at p. 692; 80 L. Ed. 1070.

> "* * * The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board. * * *"
>
> *Helvering* v. *Tex-Penn Oil Co.,* (1937), 300 U. S. 481, at p. 491, 57 S. Ct. 569, at p. 574, 81 L. Ed. 755.

Because the Board based its ultimate finding that Wards failed to bargain collectively upon an interpretation of the Act which led the Board to regard certain conduct as *per se* a failure to bargain, the Board's ultimate finding or conclusion in the present case (R. pp. 68-69) involved a mixed question of law and fact and

amounted, in the language of the Supreme Court, to "an administrative determination in which is embedded a legal question open to judicial review" (*Fed. Commun. Com'n* v. *Pottsville Broadcasting Co.,* (1940) 309 U. S. 134, at p. 145, 60 S. Ct. 437, at p. 442, 84 L. Ed. 656).

C. If the evidence was weighed by the Board under a mistaken view as to the extent of its powers or as to the meaning of the Act, the order should be set aside.

Judicial review of the legal questions embedded in an administrative determination is not limited to the final application of the law to the totality of facts found, but extends wherever a mistaken view of the law has influenced the final conclusion. If in the present case the Board weighed the evidence and made its "factual inquiries and findings * * * under a *view of the law"* which is not the view taken by this Court, the Board's findings "are quite likely not in all respects those which the Board would have made had it proceeded with knowledge" of the correct view of the law, and the case should be remanded: *District of Columbia* v. *Murphy,* (1941) 314 U. S. 441, at p. 458; 62 S. Ct. 303, at p. 311; 86 L. Ed. 277.

D. If this Court has any doubt as to the correctness of the Board's view of the law, the order should be set aside.

A jury's verdict in a case at law—its finding of fact—is, if supported by evidence, just as final as the findings of fact made by an administrative agency. The sufficiency of the evidence to support the findings of a jury is tested by the same tests as are applied to the findings of an administrative agency: *NLRB* v. *Columbian Enameling and Stamping Co., Inc.,* (1939) 306 U. S. 292, at p. 300, 59 S. Ct. 501, at p. 505, 83 L. Ed. 660.

When a case at law is reviewed by an appellate court, the "view of the law" under which the jury's findings were made appears in the instructions given by the trial court. Material errors in the instructions are grounds for reversal, since the jury may well have been influenced by such an erroneous view of the law.

The court which reviews an order of an administrative agency must also be informed as to the theory of the law under which the agency acted. The findings and decision of the agency must show what "view of the law" was taken, because, as the Supreme Court has said, speaking of an administrative order:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."
>
> *U. S.* v. *C. M., St. P., and P. R. Co.,* (1935) 294 U. S. 499, at pp. 510-511, 55 S. Ct. 462, at p. 467, 79 L. Ed. 1023.

When the findings of the administrative agency do not clearly disclose the view of the law under which the findings were made, the administrative agency has failed to make essential "basic" findings, and the case must be remanded. Mr. Justice Learned Hand has said:

> "What findings are 'basic' is a practical matter; those are such which we need to ascertain *on what legal theory* the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside." (Italics added.)
>
> *Balt. & O. R. Co.* v. *U. S.,* 22 Fed. Supp. 533, at p. 537.

If this Court is unable to ascertain with certainty the "legal theory" as to the nature of collective bargaining held by the Board;—if this Court no more than suspects that the Board acted under an erroneous view as to its

powers and the scope of the Act—the case should be remanded to the Board so that the Board can supply the deficiency and make the "findings" necessary for a proper review of the legal issues involved.

Recent decisions of the Supreme Court have shown that the courts should be alert to take such action as soon as doubts have arisen as to the legal theory under which an administrative agency has acted.

In *Phelps Dodge Corp.* v. *NLRB* (1941), 313 U. S. 177, at p. 197, 61 S. Ct. 845, at pp. 853-4 (85 L. Ed. 1271), the Court said:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the board and the procedure by which it must be asserted, and has charged the federal courts with the duty of reviewing the Board's orders, it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order."

One of the reasons for remand in *Dist. of Columbia* v. *Murphy,* (1941) 314 U. S. 441 at p. 458, 62 S. Ct. 303 at p. 311; 86 L. Ed. 311, was that the findings were "in some respects ambiguous."

In *NLRB* v. *Virginia Electric & Power Co.,* (1941) 314 U. S. 469; 62 S. Ct. 344; 86 L. Ed. 306, the Board specifically found, as to certain advice given employees by their employer, that the employer "thereby interfered with" his employees. The findings thus parallel those in the present case where the Board characterized certain specific acts as amounting *per se* to a violation of the Act. The Supreme Court said (314 U. S. at p. 479; 62 S. Ct. at p. 349):

> "It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."

Without deciding whether the other evidence in the record might support the ultimate findings, the Court ordered the case remanded to the Board because

> "We are not sufficiently certain from the findings that the Board based its conclusion * * * upon the whole course of conduct."

and because

> "Rather it appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful."

The legal theory of the Board—whether the advice was *per se* coercion or whether the circumstances under which the advice was given made it coercion—was the point which the Court regarded as "doubtful"; and this doubt required a remand of the case.

A few months afer the *Virginia Electric* case was decided, the Supreme Court held as to another agency that, when it was "not satisfied that the Commission applied the proper criterion in reaching its conclusion," and when "as seems likely here, an erroneous statutory construction lies hidden in vague findings," the agency's order should be set aside for insufficiency of findings: *U. S.* v. *Carolina Freight Carriers Corp.,* (Mar., 1942) ..... U. S. ....., 62 S. Ct. 722, at pp. 727, 730; 86 L. Ed. 622.

In a companion case, the Supreme Court added that, because the agency "placed considerable reliance" on one of its own decisions which expressed an erroneous view of the law, and because "the influence of that view seems to have permeated the findings," the case "should be remanded * * * so that the basic or essential findings required * * * may be made": *Howard Hall Co. v. U. S.*, (1942) .... U. S. ...., at p. ....; 62 S. Ct. 732, at p. 735; 86 L. Ed. 639.

Even if Wards is unable to do more than to raise a doubt in the minds of this Court as to the effect on the Board's ultimate conclusions of some unsupported or improper findings, or even if Wards is unable to do more than cause this Court to question whether the Board's interpretation of the Act was a proper one, the order should be set aside and the case remanded to the Board for clarification and elimination of all doubts. This Court must be presented with findings which make it "sufficiently certain" that the Board acted under a correct view of the law.

II.

The Board Incorrectly Interpreted the Statutory Requirement That an Employer Bargain Collectively.

The errors of law which the Board committed fall into two classes:

1. misconstructions of the Act which are clearly stated and appear on the face of the Board's opinion;

2. misconceptions of the law which, while not baldly stated in so many words, are implicit in the language and the reasoning of the Board; in other words, "erroneous statutory constructions hidden in vague findings."

This proposition discusses certain errors of law which fall within the first of these classifications.

Wards' Brief as Petitioner pointed out a number of respects in which the Board misinterpreted the Act. To avoid repetition, these misinterpretations are simply listed here, with a reference to the place in the Board's decision where they appear and a reference to the pages in Wards' Brief as Petitioner on which they are discussed.

Upon these points, the Board has stated its position without equivocation. These errors alone demonstrate that the Board acted under an erroneous "view of the law," and they require reversal just as much as the erroneous views of the Board in *Texas Co.* v. *NLRB,* (9th cir.), 120 Fed. (2d) 186, caused this Court to remand the entire proceeding.

A. The Board incorrectly interpreted the Act as requiring an employer to make concessions or at least to be willing to make concessions.

In defining the duty to bargain, the Board quoted its own previous holding that an employer must show a "willingness to modify demands" (R. 56). This definition of the duty to bargain would establish the guilt of an employer who "demanded" in negotiation that the *status quo* be continued, and who did not "modify" or exhibit a "willingness to modify" this position. Since the only modification possible would be a concession to the union demands, guilt would result from a failure to make concessions.

The duty to bargain, so interpreted, becomes the duty o make concessions. This the Act was never intended o require. (The authorities for this proposition are collected in Wards' Brief as Petitioner, pp. 25-29.)

That the Board "placed considerable reliance" on its previous decision so defining the duty to bargain appears

from the manner in which the Board condemned Wards for conduct which amounted simply to a refusal to make certain concessions demanded by the unions (See Ward's Brief as Petitioner, pp. 50-52).

B. The Board incorrectly interpreted the Act as imposing an absolute duty upon an employer, whenever requested by the union, to contract to do that which he is compelled to do anyway.

The Board held that the law placed on Wards an "obligation to 'bind itself to give exclusive recognition'" to the Union (R. 61). So interpreting the law, the Board held that Wards' insistence that recognition already given be simply recited in a preamble to the proposed labor contract "did not satisfy the respondent's obligation" (R. 61).

The same interpretation of the Act led the Board to hold, further, that a refusal, in advance of agreement, to discuss the question whether any agreement reached should be reduced to writing and signed was "tantamount to a refusal to bargain" (R. 59-60); and to hold further that Wards' refusal to insert a clause promising not to disobey the injunction of the Act against union discrimination "demonstrated its refusal to bargain collectively" (R. 61-62). (Footnote 1).

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1. In its attempt to justify the Board's holding on this point, counsel for the Board misrepresent the purport of the holding in **Singer Mfg. Co. v. NLRB**, (7th cir.), 119 Fed. (2d) 131, (cert. den. 313 U. S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549), saying:

> "In that case, Board findings that the employer's rejection of a clause prohibiting anti-union discrimination upon the ground that such 'was its legal duty irrespective of contract' was indicative of a want of good faith were expressly sustained by the Court, 119 Fed. (2d) at 138-139." (Board's brief, p. 28)

In the **Singer** case, the Court reviewed the employer's position on all the clauses in the contract submitted by the union, pointing out that the employer insisted any contract should permit it to "change its practice whenever in its opinion such action seemed necessary" (p. 136), that "the circumstances * * * indicated * * * a further intent to

The correct view of the Act is that it contemplates agreement upon matters that might otherwise be left to the unilateral determination of the employer; and that legal duties which cannot be avoided by a labor contract are not proper subjects to be included. To construe the Act as imposing an absolute duty to agree to do what must be done in any event is absurd, since no useful purpose would be served. The Act does not contemplate compelling conduct which has no bearing on industrial peace. Strikes are not averted by promises to do what the law compels the employer to do in any event; and strikes never occur simply because of a refusal to make this kind of a promise. (This point is discussed on p. 44 of Wards' Brief as Petitioner.)

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refuse to include in any contract a proper bargaining clause as to wages" (p. 137), and that the employer insisted "upon express reservation of the right to determine terms of employment, limited in no way by provision for collective bargaining with reference thereto" (p. 138). Hence there was evidence that the employer had "sealed his mind against the thought of entering into an agreement" (p. 139).

The Court pointed out that the anti-discrimination clause prohibited strikes by the union and lockouts by the employer as well as discrimination (see 24 NLRB 444, at p. 467). The fact which the Court emphasized was that, "when United abandoned its request for a nondiscrimination pledge by petitioner the latter persisted that United obligate its members as it had suggested" by a no-strike clause (119 Fed. (2d) at p. 138). Thus the fault of the employer lay in its insistence that the union bind itself in a field where the employer refused to be bound.

This was also the ground on which the Board itself based its conclusions. Pointing out that the no-lockout clause went further than to prohibit that which the law prohibited (24 NLRB at p. 467), the Board said:

> "Moreover, whereas the clauses proposed by the United proceeded upon the recognition of the equal * * * responsibility of both * * *, the respondent, on the other hand, in effect insisted that the United accept an inferior position by agreeing to a contract which placed restrictions only on the United."
>
> (24 NLRB at p. 467)

Neither the Board nor the Court held that the rejection of the anti-discrimination clause was in itself evidence of a refusal to bargain, and hence the Board's brief clearly misrepresents the purport of the holding.

C. The Board incorrectly interpreted the Act as prohibiting an employer from simply telling employees not reporting for work on the day of a strike that the plant was operating and their jobs were open.

The Board held that certain telephone calls, limited to the single message that the struck plant was continuing operations and that the employees' jobs were open, were in themselves a violation of the Act:

> "We find that by such solicitation and by undercutting in this manner the authority of the Unions to act as the exclusive bargaining agents of the employees * * * the respondent has interfered with, restrained, and coerced its employees" (R. 74).

The Board further concluded that:

> "The respondent thereby violated its obligation to deal with the Unions as the exclusive representatives of the employees" (R. 67).

In the absence of any showing that the telephone calls actually induced a single employee participating in the strike to return to work, (*Stonewall Cotton Mills, Inc.* v. *NLRB,* (5th cir.), June 3, 1942, ... Fed. (2d) ...., at p. ...., 10 Lab. Rel. Rep. 514), and in the absence of any semblance of threat or inducement, (Footnote 2) an employer's message to his employees, stating facts and no more, is clearly within the legal province of the employer: *Wilson & Co.* v. *NLRB,* (7th cir.), 120 Fed. (2d) 913 at p. 919. To interpret the Act as prohibiting an employer from giving such a message to his employees is to disclose a complete misconception on the part of the Board of the extent of the duties imposed by the Act. (This point is also discussed on pp. 60-62 of Wards' Brief as Petitioner.)

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2. The Board misrepresents the facts by speaking of Wards' "effort to 'undercut' the authority of the duly chosen bargaining representatives of the employees with a request that they return to work" (Board's brief, p. 35). No such "request" was made, and the instructions expressly prohibited it (R. 69-70).

Wards contends that each of these three incorrect interpretations of the duties imposed by the Act was a material factor in the ultimate conclusion which the Board drew. The argument does not, however, stand or fall on a showing that the Board was wrong in all three respects. If this Court should agree that the Board's view of the law was erroneous in a single one of these three respects, the order should be set aside and the case remanded to the Board, since to quote the language of the Supreme Court:

> " * * * the factual inquiries and findings of the Board, made under a view of the law not our own, are quite likely not in all respects those which the Board would have made had it proceeded with knowledge of our opinion. * * * "
>
> *District of Columbia* v. *Murphy,* (1941) 314 U. S. 441, at p. 458, 62 S. Ct. 303, at p. 311; 86 L. Ed. 277.

III.

The Board's Decision and Order Disclose That the Board Sought to Exercise a Managerial Authority Not Conferred on It By Statute.

The misinterpretations of the Act just discussed are clear and unambiguous. The Board's errors of law do not end with them, however; other and equally improper views of the law are disguised by general phases or are implicit in adjectives used to characterize conduct. They illustrate what the Supreme Court meant when it spoke of "an erroneous statutory construction" which "lies hidden in vague findings": *U. S.* v. *Carolina Freight Carriers Corp.,* (Mar., 1942) ..... U. S. ....., at p. ....., 62 S. Ct. 722, at p. 729; 86 L. Ed. 622.

In Ward's Brief as Petitioner, the Congressional reports and the decisions were analyzed to show that the

Board may not pass judgment on the reasonableness of the terms on which an employer insists. To do so would require an employer to offer such terms as meet with the approval of the Board and would convert the Act into one requiring compulsory arbitration. Whatever the merits of compulsory arbitration, if any, may be, the Congress did not intend, and the decisions do not permit, an interpretation of the Act converting it into one compelling such arbitration. The Board consequently has no authority to approve or disapprove the terms offered by an employer:

> "The law does not authorize the Board * * * to make collective bargaining contracts nor to prescribe what shall be written in them."
>
> *NLRB* v. *Whittier Mills Co.,* (6th cir.) 123 Fed. (2d) 725, at p. 728.

To state the point succinctly, in the words of this Court,

> "The act does not vest in the Board managerial authority."
>
> *NLRB* v. *Union Pac. Stages,* (9th cir.) 99 Fed. (2d) 153, at p. 177.

Obscured by the vagueness of the Board's language, this is exactly the authority which the Board sought to exercise in the present case.

The Board, in defining the duty to bargain, stated that

> "The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind" (R. 55).

Elsewhere the Board spoke of the

> "Obligation 'to discuss fully and freely * * * claims and demands and, when these are opposed, to justify them on reason' " (R. 66).

These statements are not necessarily incorrect in themselves; they find an echo in remarks made *obiter* by the Courts (Footnote 3). But they are ambiguous, and the application of them shows that this ambiguity conceals an erroneous view of the law.

Wards' Brief as Petitioner has shown that the particular "open and fair mind," the "sincere negotiations," or the "good faith" required of an employer embraces no more nor less than a willingness to enter into a binding trade agreement on acceptable terms if any are discovered, and to take the necessary steps of recognition, discussion, and acquiescence in acceptable terms (Wards' Brief as Petitioner, pp. 33-36, and the cases there cited).

The employer must "justify his position on reason"; that is, he must advance the reasons for his position so that the unions may have the opportunity to meet his arguments. But he need not at his peril advance reasons which convince the Unions or the Board. An employer can remain unpersuaded to change his position even by arguments which the Board may believe to be sufficient, since the statute does not require an employer

> "to make a collective contract hiring individuals on any terms other than it may by unilateral action determine."
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> *NLRB* v. *Knoxville Pub'g Co.*, (6th cir.) 124 Fed. (2d) 875, at p. 883.

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3. The second passage purports to be a quotation from **NLRB v. Geo. P. Pilling & Son Co.**, (3d cir.), 119 Fed. (2d) 32, at p. 37. In that case according to the Court: "At no time did he [the employer] explain his views" (p. 35). Of course, the duty to bargain includes the duty to explain the terms upon which the employer will insist; to that extent he must "justify on reason" the position he takes. But the soundness of the reasons advanced in explanation of his stand is no concern of the Board.

The Board, however, regarded the phrases which it quotes as licensing it to pass judgment, not on the fair-minded willingness of Wards to contract on acceptable terms, but on the fairness of the terms which Wards would accept. That the Board acted on the assumption that it possessed such a managerial authority is disclosed by several passages in the Board's decision:

1. The Board made a point of the supposed fact that "Powell was troubled about the reasonableness of the position he had taken" (R. 42). If a difference of opinion between Powell and Barr on such a matter existed, it was completely irrelevant except upon the assumption that the "reasonableness" of the position was an issue before the Board. The Board's mention of the point betrays its concern over a matter which was not its business.

2. In discussing the insistence of Wards that recognition be recited rather than promised, the Board said:

   "But as Ashe, the Department of Labor Conciliator, pointed out, the only explanation for the respondent's refusal to agree to include this clause in its contract was that it 'merely did not want to give the Union the satisfaction of having it there'" (R. 61).

   The Board thus adopted the hearsay of Ashe's supposed opinion as part of its own "concluding findings." Thus the Board based its ultimate conclusion in part upon its disapproval of the supposed reasons for a management decision as to the terms on which the employer would insist.

3. The next sentence in the Board's opinion quotes *Wilson & Co.* v. *NLRB,* (8th cir.), 115 Fed. (2d) 759, as holding that

> "A refusal to do what reasonable and fair-minded men are ordinarily willing to do, upon request, may certainly be taken to be an indication of a lack of proper intent and good faith in collective bargaining."
> 115 Fed. (2d) at p. 763.

This is the old trick of taking a *part* of a sentence out of its context and reading into it a meaning it was never intended to have. The *Wilson* case dealt with a refusal to reduce agreements reached to written form. The refusal to sign an agreement reached is the "refusal to do what reasonable and fair-minded men are ordinarily willing to do" to which the court refers; but this is the court's *characterization* of the refusal, and not the *reason* why the refusal "may be taken to be an indication of a lack of proper intent."

That reason is fully stated. The legislative intent is that "contracts satisfactory to both employer and employee may be reached," but "agreements can hardly be said to be satisfactory when the evidence of their existence must be made to depend upon the uncertain memories of parties." (115 Fed. (2d) at p. 763.)

The *Wilson* opinion thus says in unmistakable words that the contracts to be reached are those "satisfactory to both employer and employee." Whether or not the terms are in fact "satisfactory" is a proper inquiry; whether or not the terms insisted upon appear to the Board to be reasonable is not.

The Board reveals its misconception of the law by its misuse of this quotation (Footnote 4).

4. The Board also said:

> "We are satisfied upon this record that the respondent, in thus relying simply on existing practice as a reason for not agreeing to union proposals, failed to fulfill its obligation * * *" (R. 66).

The Board thus evidences its preoccupation with the "reason" for Wards' insistence on maintaining the *status quo,* and follows this statement with the passage previously quoted about an employer's supposed obligation to "justify" his position "on reason."

5. The Board also listed among the "respects" in which Wards failed to bargain a supposed difference between Barr and Powell over the union demand for no work in excess of five hours without a meal period (R. 66-67). Since the Board admits that "Powell at all times insisted that the respondent's past policy * * * be followed," the supposed difference can have no significance whatsoever unless the reasonableness of the position taken be an issue (Footnote 5).

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4. The **Wilson** opinion clearly shows that the court did not differ with the definition of the "good faith" and "sincerity" required by the Act which Wards has advanced to this Court:

> "We do not believe that negotiations which are carried on without any intention of reaching a definite agreement or of reducing to writing any agreement that may be reached constitute a full compliance with the act."
>
> (115 Fed. (2d) 759)

The "good faith" required, is, as we have said, no more nor less than a willingness to agree when terms are in fact satisfactory and acceptable; but the reasons why they may be unacceptable or unsatisfactory are not the subject of inquiry by the Board.

5. The Board's brief referred to this point as an illustration of Wards' supposed refusal to agree to "concededly reasonable proposals", and stated that Powell's position "demonstrates its unwillingness to agree to any proposal, no matter how reasonable" (Board's brief, p. 28). Since the proposal was a demand for a concession, the Board's argument is that an employer refuses to bargain if he rejects a demand for a concession which the Board believes to be reasonable.

These five passages from the Board's decision, read in the light of the Board's definition of the duty to bargain, at least suggest that the Board believed it could examine into the reasonableness of the positions taken by Wards in the course of bargaining. Even if it be denied that the Board's assumption of such managerial authority was certain or indisputable, the passages quoted must at least leave this Court unsatisfied as to the results of the inquiry it must make whether the Board applied the proper statutory standards. But:

> "If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process."
>
> *U. S.* v. *Carolina Freight Carriers Corp.,* (Mar., 1942) ..... U. S. ....., at p. .....; 62 S. Ct. 722, at p. 730; 86 L. Ed. 622.

If the Brief which the Board has filed in this case fairly states the view of the Board itself, doubt ripens into certainty, since the Brief relies heavily (see pp. 24, 26, 29, and 34) on what it terms "respondent's refusal to agree to concededly reasonable proposals" (Footnote 6). Obviously the argument presupposes that if an employer does not agree to proposals which the Board considers reasonable he acts in bad faith.

Under the guise of determining the question whether Wards bargained collectively, the Board actually passed judgment on the terms which Wards should have offered or accepted while bargaining. This the Board had no power to do.

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6. The phrase, often repeated in the Brief, is intelligently dishonest, since Wards has not "conceded" the reasonableness of the demands, and would be ready to defend the reasonableness of its own position were it an issue (See Proposition VIII of this brief).

This is not the first time that an administrative agency has sought to disguise the usurpation of one power as the exercise of another and proper one; but the courts have always been alert to the danger:

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption."
>
> *Waite* v. *Macy,* (1918) 246 U. S. 606, at p. 608, 38 S. Ct. 395, at p. 396; 62 L. Ed. 892.

If the Supreme Court felt called upon in the *Waite* case to exercise its power of review to prevent the usurpation of the power to exclude colored tea—a matter of small social import,—this Court should not hesitate to act similarly when the power sought to be acquired is one of writing the terms of the labor contracts for every employer subject to the Act.

IV.

The Board Rested Heavily Upon Findings Which Are Clearly Improper.

The Board in its "concluding findings" on the subject of collective bargaining stated "that the respondent failed in a number of respects to comply with its obligation to bargain" (R. 58). These several respects, nine in number, were then set forth (R. 58-67). The Board, after reciting them, said: "Reviewing the whole congeries of events, we find that the respondent did not, as it was bound to do, 'confer and negotiate sincerely with the representatives of its employees'" (R. 68).

Obviously, then, these nine "respects" set forth in its "concluding findings" on the question of collective bargaining were, all of them, findings on which the Board "rested heavily."

Among these findings were embedded the various misconceptions of the law which have been enumerated under propositions II and III of this brief. Since these errors of law were intermixed with the findings on which the Board "rested heavily," the case should be remanded if Wards is right as to a single one of these claimed errors of law, under the doctrine of *NLRB* v. *Virginia Electric & Power Co.,* (1941) 314 U. S. 469; 62 S. Ct. 344; 86 L. Ed. 306, and the other cases cited under Proposition I.

The Board also "rested heavily" upon other findings which are either completely unsupported by evidence or clearly improper for other reasons. The findings are so conspicuously erroneous as to demonstrate the need for remand even without proof that the ultimate conclusion totally lacks substantial support.

A. The Board rested heavily upon a finding that a breach of instructions on the part of a supervisor having no part in the collective bargaining negotiations "reflects on Wards' good faith in the collective bargaining negotiations".

The Board said:

> "Finally, the respondent, as noted below, solicited the individual striking employees to return to work in violation of Section 8(1) of the Act. * * * Such conduct reflects on its good faith in the collective bargaining negotiations" (R. 67).

Perhaps by deliberate intent, the Board failed to state whether it meant that the "solicitations" which reflected on Wards' good faith were the innocuous telephone calls made the day after the strike which have already been discussed, or the supposed activities of supervisor McGowan. This very ambiguity amounts to a lack of the

"basic findings" necessary to a correct understanding of the Board's theory, and in itself is enough to require reversal. (Proposition I, Section D.)

If the Board meant to refer to the telephone calls only, the fact, as already discussed, that they were within Wards' legal rights makes the inference of bad faith untenable. But if the Board meant to refer to all of the conduct which it treated as amounting to solicitation, including McGowan's activities, the Board drew an inference which is logically without support in the record for other and equally cogent reasons.

The Board itself found that, in doing more than telephoning the standard message to the employees, McGowan "went beyond" (R. 70) the instructions given him, which forbade any insistence on a return to work, or any threats, or any discussion with employees whatsoever (R. 69-70).

Wards' bargaining representatives neither participated in nor knew of McGowan's supposed improper activities. Even if Wards is to be held responsible for McGowan's actions in derogation of his instructions—a disobedience not known to Wards' management—this ascription in no manner whatsoever permits an inference as to lack of good faith on the part of the representatives of Wards' management in the bargaining negotiations in which McGowan did not participate.

The drawing of such an inference reflects instead on the good faith of the Board's findings.

B. The Board rested heavily upon findings which included absolute misstatements of the record.

The Board's "concluding findings" on the question of collective bargaining include certain clear misstatements of fact. Without repeating at length the discussion in Wards' brief as Petitioner, the following list shows that the Board clearly disregarded the record in making its findings:

1. "The respondent has offered no explanation for its refusal to submit * * * written countersuggestions" (R. 65).

   The reasons for Wards' position were fully explained to the Unions in the bargaining sessions and were in evidence before the Board in the correspondence between Powell and Barr (See Wards' Brief as Petitioner, pp. 54-56). Perhaps the Board was not satisfied with Wards' reasons; but to say that Wards "offered no explanation" is an absolute untruth.

2. Wards "in thus relying simply on existing practice as a reason for not agreeing to minor proposals, failed to fulfill its obligation" (R. 66).

   Wards did not simply rely on existing practices as the reasons for its insistence on the *status quo;* it advanced its reasons to justify existing practices on each point and discussed them fully. (The references to the undisputed evidence are collected on p. 52 of Wards' Brief as Petitioner.)

3. "Nevertheless, the respondent objected to taking the initiative in the bargaining process; that is, objected to formulating proposed conditions of employment affirmatively, as counter-proposals to union demands" (R. 63).

Wards refused to submit a formal written counter-proposal, but it "affirmatively" participated in the formulation of acceptable terms in modification of union demands.

Without repeating the passages from the Board's own findings which show Wards' active participation (See Proposition II of Wards' Brief as Petitioner), a brief description of one part of the Board's own evidence will remove the issue from the field of possible debate.

Board's exhibits 10 (R. 531) and 12 (R. 556) are copies of proposed contracts on which the union representatives recorded several changes in wording proposed by Wards. Exhibit 10 shows, as to the sections annotated by the unions, the following changes of wording suggested by Wards:

Section 4—"Thanksgiving" to be substituted for "Armistice Day."

Section 13—Marked "OK—changed" by substitution of "6" for "5."

Section 31—(Wages) marked "no increase." (The wage scale acceptable to Wards had previously been furnished—R. 40.)

In addition, Sections 15, 17, 19, and 28 are marked "OK," showing Wards' expression of agreement. Exhibit 12 shows the following changes in wording suggested by Wards:

Preface—"use language of certification."

Article 1—Conversion of recognition into a statement of fact rather than a promise.

Article 3—Eight words stricken out of Section 1; Section 2 stricken out entirely; and five words stricken out of Section 3.

Article 4—A note in the margin reads: "co. not in position to grant increases—Powell." The last sentence is stricken, and a verbal change on the next to the last sentence is shown.

Article 7—Certain words are cut out.

Article 12—Several words are added to the clause as written.

Furthermore, Articles 6, 8, and 9 are stricken, and Article 13 is noted "*out* by Estabrook."

These two Board Exhibits conclusively show that Wards affirmatively assisted in formulating acceptable terms. This fact is shown so clearly that we need not refer to the many other items of undisputed evidence to the same effect.

The Board's repeated assertions that Wards refused to make any "affirmative efforts" to reach an agreement display a complete disregard for the truth.

Other unfounded assertions in the Board's "concluding findings" are noted in Wards' Brief as Petitioner (see pp. 58-59) and are discussed incidentally under Proposition VIII of this brief. Enough has been said, however, to demonstrate that the Board's findings are "permeated" with misstatements of fact and completely unfounded assertions. The Board cannot deny that it was influenced in its final conclusions by these unfounded and unsupported criticisms of Wards' conduct. To permit an order to stand when based on findings tainted by such errors would be inequitable and an invitation to further abuses on the part of the Board.

C. The Board rested heavily on an inference drawn from matters which were not in evidence before it.

The essence of that procedural due process which must be observed by this Board just as much as by other administrative agencies is a fair trial. A fair trial implies notice of the evidence on which the decision is to be based: *Railroad Com'n* v. *Pac. Gas & Elec. Co.,* 302 U. S. 388, at pp. 392-393, 58 S. Ct. 334, at pp. 337-338; 82 L. Ed. 319. That principle prohibits an administrative agency from considering matters not introduced as evidence: *I. C. C.* v. *L. & N. R. Co.,* 227 U. S. 88, at p 93; 33 S. Ct. 185, at pp. 187-188; 57 L. Ed. 431; *U. S.* v. *Abilene & S. Ry. Co.,* 265 U. S. 274 at 288; 44 S. Ct. 565 at p. 569; 68 L. Ed. 1016.

The Board in its "concluding findings" on collective bargaining stated that "the respondent's declarations abundantly disclose an attitude inconsistent with its obligation" (R. 62). Among the three "declarations" is a sentence lifted from the brief which Wards filed with the Board attempting a definition of the minimum requirements of the duty to bargain (R. 63).

The brief was not in evidence, nor was any notice given Wards that arguments of its counsel as to the minimum requirements of the Act would be the basis of an inference that Wards in prior negotiations had done no more or intended to do no more than observe such minimal requirements. Such an inference is completely untenable; the situation would be the same as if the Board had concluded that Wards offered no concessions to the Unions simply because Wards contends that it was under no duty to do so.

The lack of logic in the Board's inference emphasizes the complete absence of fairness in the Board's consid-

eration of a legal argument as the basis for reaching a factual conclusion. Under such a practice, an employer would advance an argument of law on peril that the Board, if it did not agree, would deduce facts about the employer's state of mind merely from the making of an argument. This procedure is a complete denial of due process.

D. The Board rested heavily upon unsupported inferences drawn from irrelevant evidence as to the interpretations of the law held by Wards' representatives, and the Board furthermore erroneously concluded that the mere holding of a view of the law which disagreed with the views of the Board amounted in itself to a violation of the Act.

The Board's reference to the brief filed with it by Wards' counsel was only one of several instances where the Board inferred that, because Wards expressed a different view from that held by the Board as to the extent of the duties imposed upon it by the Act, Wards evidenced a refusal to bargain. The Board's extensive discussion of Wards' view of the law shows how much the Board was influenced by its disagreement with Wards' opinion as to the proper interpretation of the Act.

1. The interpretations of the law which the Board disliked were proper.

The Board's concluding findings discuss at length four expressions of opinion as to the nature of the duty to bargain. The Board's misconception of the law is emphasized by the fact that it chose to criticize statements which were entirely defensible.

a. "As Barr, speaking for the respondent, told its agent, Powell: '* * * it is the Union, not the Company, which is seeking an agreement."

Barr's opinion was that the duty imposed by the Act upon an employer is only to negotiate union demands, and not to seek a union agreement. This view of the law is supported by quite respectable authority:

> "However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining."
>
> *NLRB* v. *Columbian Enameling & Stamping Co.*, (1939), 306 U. S. 292, at p. 297, 59 S. Ct. 501 at p. 504, 83 L. Ed. 660.

b. "Accordingly, Powell told the Unions at the December 13 conference that 'his conception of negotiations was that the company had no affirmative duty to do anything and that it was up to the Union to please the company'." (R. 62)

Powell thus interpreted the Act as imposing no "affirmative duty" on the employer. Whether or not this is true is an argument over a label and not an argument over a matter of substance. As Mr. Justice Frankfurter has commented in another connection:

> "'Negative' and 'affirmative' in the context of these problems, is as unilluminating and mischief-making a distinction as the out-moded line between 'nonfeasance' and 'misfeasance'."
>
> *Rochester Tel. Corp.* v. *U. S.*, (1939), 307 U. S. 125, at pp. 141-142; 59 S. Ct. 754, at pp. 762-763, 83 L. Ed. 1147.

Realistically, no one can deny that bargaining usually begins with union demands, and that the unions have the burden of convincing the employer that these demands should be acceptable.

c. "Similarly, the respondent in its brief states that 'the duty to bargain is no more * * * than the duty to meet the employee representative and do * * * or say nothing which would make a binding trade agreement impossible of attainment'." (R. 62-63)

Stated conversely, the duty to bargain is no more nor less than the duty to recognize the authority of the union, to discuss union demands sufficiently to avoid mutual misunderstanding, and to make binding and written agreements on such terms, if any, as are mutually acceptable. Any conduct less than this would be the doing or saying of something "which would make a binding trade agreement impossible of attainment".

All of the authorities cited under Proposition I of Wards' Brief as Petitioner uphold the propriety of the opinion thus expressed in Wards' brief to the Board.

d. "That the respondent was opposed to affirmative efforts on its part to find a basis for agreement by means of counterproposals appears also from Barr's statements that the respondent had at no time sought a contract with a union and that

> Therefore, by the very nature of the situation, the initiative lies with the union. We propose to fill our obligations to bargain with the Unions in good faith, but this does not pass to us 'the burden of going forward'. The initiative continues to lie with the union throughout the bargaining process. The only thing which will change our status in this regard is a change in our rela-

> tive economic positions of such nature as to induce us to seek some concession from the union. * * *
>
> As Mr. Ball stated, we do not think that the Act places upon an employer the absolute duty to make counterproposals. * * * " (R. 63-64)

Such is Barr's analysis, in his advice to Powell, of the extent of the duty to bargain. The Board's apparent criticism is that Barr believes that under the Act "the initiative lies with the union" (R. 64) and that the union is the party which has "the burden of going forward". Again Barr's opinion has judicial sanction:

> "The employer is not required to take the initiative in seeking a contract with his employees or with their chosen representatives."
>
> *Wilson & Co.* v. *NLRB,* (8th cir.), 115 Fed. (2d) 759, at p. 764

2. Proof that Wards' representatives may have held a wrong view of the meaning of the Act does not support an inference that what they did violated the Act as properly interpreted.

Even if we assume for the sake of argument that the interpretation of the Act held by Wards' representatives was wrong, still the holding of a wrong view of the meaning of a law did not make Wards a law-breaker.

Obviously, a man may believe that he is under no legal duty to act, but still may act. If, as it was held in *F. W. Poe Mfg. Co.* v. *NLRB,* (4th cir.), 119 Fed. (2d) 45, at p. 48, an intent to violate the Act does not constitute a violation unless acted upon, *a fortiori* a misconception of the scope of the legal duties does not constitute a violation of the Act unless it results in a refusal to do as much as the Act really commands.

The undisputed evidence shows that Wards did more in the negotiations than it felt it was absolutely bound to do under the Act. We have already shown that Wards did in fact "actively cooperate" with the unions in an attempt at "formulating proposed conditions of employment affirmatively". To take another example, Wards' representatives believed that the Act did not require Wards to make concessions; nevertheless Wards did in fact offer concessions, as the Board itself grudgingly admitted.

The undisputed evidence that Wards consistently did more than it believed itself bound to do makes completely untenable any inference that Wards' negotiators did or intended to do no more than the minimum required by its own view of the law. Thus, since Wards did in fact make concessions, any argument that Wards' negotiators did not make or did not intend to make concessions is absurd.

The fact is that negotiators may conduct bargaining sessions under a mistaken belief that they are legally bound to do nothing, and still bargain collectively. If the Board were correct, no collective bargaining ever took place before the Act was passed, since no employer believed himself to be legally bound to bargain.

For these reasons the interpretation of the Act which Wards' negotiators held is completely irrelevant to the question whether Wards bargained, since Wards' view of the law cannot support any relevant inference.

3. The Board actually held that a belief in an erroneous interpretation of the Act amounted in itself to a violation of the Act.

The Board did not in fact expressly claim to draw any inference from the views of the law held by Wards. Actually, the Board concluded that the mere holding of such views amounted to a violation of the Act!

The first three statements quoted above are the three "declarations" which the Board prefaces with this statement:

> "The respondent's declarations abundantly disclose an attitude inconsistent with its obligation actively to cooperate with the Unions and to endeavor to reach understandings with them." (R. 62)

The quotation of these three "declarations" is then followed by the assertion that:

> "The Board and the court decisions hereinabove cited clearly established that the respondent by its negative attitude was refusing to bargain collectively in good faith." (R. 63)

The effect of these two statements is that the holding of a view of the law with which the Board disagreed constituted an "attitude" by which Wards "was refusing to bargain collectively".

Three out of the four expressions of opinion were never repeated to the Unions. Obviously, it was not the making of the statements which the Board held to be a violation of the law, but the holding of the interpretations.

In the absence of evidence that Wards took some action in violation of the law, and in the absence of evidence that Wards intended to do no more than it believed itself bound to do legally, the Board's belief that Wards' view of the law constituted an illegal "attitude" is so patently absurd as to demonstrate the prejudiced and arbitrary character of the Board's fact finding process.

E. The Board seeks to support its conclusion that Wards failed to bargain by drawing an inference from Wards' supposed violation of Section 8 (1) of of the Act, while basing its conclusion that Section 8 (1) was violated in part upon an inference drawn from Wards' supposed failure to bargain.

The Board's decision contains a classic example of argument in a circle. Discussing Wards' supposed "solicitation" of its employees, the Board said:

> "Further, as we have found above, the strike was caused by the respondent's unlawful refusal to bargain collectively. Under these circumstances, and upon the entire record, we find that the respondent, by communicating with the employees directly through its supervisory employees * * * was seeking to induce the striking employees to desert the Unions. * * * " (R. 74)

The Board thus "rested heavily" upon its previous conclusions that Wards had refused to bargain and that this refusal caused the strike when it held that the telephone calls to Wards' employees amounted to a violation of Section 8 (1) of the Act.

But the Board had based its conclusion that Wards had failed to bargain collectively partly on an inference of bad faith drawn from the supposed "solicitation":

> "Finally, the respondent, as noted below, solicited the individual striking employees to return to work * * * Such conduct reflects on its good faith in the collective bargaining negotiations." (R. 67)

This lack of logic vitiates both conclusions.

Enough had been said to show that the Board weighed the evidence in the present case not only under a misconception of the scope of the duty imposed by the Act and of the powers conferred upon the Board, but under a biased and unsupported view of the facts. The Board

was influenced in its decision by improper considerations; the Board drew untenable inferences; and the Board disregarded the fundamental principles of fair play. This Court surely cannot blind its eyes to the injustice which an affirmance of this order would constitute.

V.

The Board's Brief Evidences Bias and Prejudice In Its Attempt to Argue in Support of the Board's Order By Reference to Matters Which Were Not Before the Board and Which Represent a Previous and Demonstrably Unfair Action Against Wards By the Board.

If a brief were proper evidence of the mental processes of the party on whose behalf it is filed, then the Board's brief in the present case would demonstrate that the Board reached its conclusions after considering matters which were not in evidence before it, and which, because of their history, would never have been considered unless the Board were biased and completely unfair.

Because, unlike the Board, we do not assume that a brief prepared by counsel necessarily represents the thinking of the client, we make no such argument; but the attempt of the Board's counsel to create prejudice by the brief they have prepared is so flagrant that we would do this Court a disservice by remaining silent.

A. The Board's brief argues as if the Board considered its conclusions of fact in a previous proceeding against Wards in reaching its conclusions in the present case, although no record of such prior proceeding was introduced in evidence in the present case.

On page 6 of the Board's brief a footnote refers to "an earlier decision involving the mail order house and retail store here involved, 9 NLRB 538." The note then quotes

certain evidence introduced in the former case as to events occurring in 1936, and adds:

> "Powell's stand at the September 19 conference makes it clear that respondent's 'long-established policy' in 1936 was still in effect in 1940, though it plainly violated the Act."

The Board thus argues to this Court that its order should be sustained because certain evidence offered at a hearing several years earlier justified the Board in drawing inferences from the evidence actually introduced in the present proceeding. This argument necessarily presupposes that the Board did consider the evidence introduced at the previous hearing in drawing its inferences in the present proceeding. If this be a fact, the Board has denied Wards due process. If this is not the fact, the argument by Board's counsel is unwarranted and unprofessional.

Wards was never given any notice that evidence introduced at the prior hearing was to be considered by the Board in the present hearing. Wards was never given any opportunity to rebut either the evidence so considered or the inferences which Board's counsel claim that the Board drew from this evidence.

Board's counsel refer to the prior hearing elsewhere in the Board's brief. On page 27, Board's counsel argue, with respect to Wards' refusal to agree to an anti-discrimination clause:

> "The employees' experience when they first attempted to organize and exercise their rights under the Act in December, 1936, gave them ample reason to believe that the law alone was not complete protection against discrimination at respondent's hands."

To this statement, a footnote is appended, stating that the Board found that Wards was guilty of "discharging

23 employees because of their union membership and activities."

This argument is made in a section of the Board's brief entitled "Respondent's refusal to agree to concededly reasonable proposals." Board's counsel thus argues that the facts of the previous case provided the reason why Wards' position was, in the eyes of the Board, "unreasonable."

If the Board's decision was in any part based upon the circumstances supposedly disclosed by the previous hearing, but which were not introduced in evidence in the present case, Wards was denied procedural due process, and the Order must be set aside. This would not be the first time Wards has been accorded such treatment by the Board: *Montgomery Ward & Co.* v. *NLRB* (8th cir.), 103 Fed. (2d) 147.

B. The reference by Board's counsel to the earlier proceeding is doubly inexcusable in view of the fact that a Congressional investigation has shown that the earlier proceedings were not prosecuted by the Board in good faith.

The earlier proceeding involving the Portland mail order house and store was decided by the Seventh Circuit Court of Appeals on December 8, 1939: 107 Fed. (2d) 555.

On December 30, 1940, (Cong. Rec. Vol. 86, Part 12, p. 14011) a special committee of the House of Representatives (the so-called "Smith Committee") reported on its investigation of the National Labor Relations Board pursuant to House Resolution 258, Seventy-Sixth Congress, First Session. The following excerpt from this

Report shows the real character of the charge of discrimination which the Board made against Wards:

> "The attitude of another regional attorney who deliberately misrepresented the strength of the Board's case to the secretary of the Montgomery Ward Company of Chicago, Illinois, in a letter dated January 19, 1939, is again another example of the lengths to which some of these Board attorneys went in order to bend employers to their will. In a very lengthy letter he reviews the Board's decision and states that elsewhere in the record is a great deal of evidence supporting an 8 (3) finding. He closes his communication by stating '* * * I feel that a careful examination of the record as made will allow you to advise your principals that a great deal of doubt exists as to your ability to prevail in the circuit court in this matter.'
>
> "While Mr. Babe's arguments appear persuasive on the face of the letter, the truth of the matter is to be found on a memorandum attached to a copy of the letter as found in the files of the Seattle regional office to which Babe was attached. This memorandum reads:
>
> Dear E. J.: [Eagan, regional director] This is mainly hooey, as the 8 (3) proof is so highly equivocal as to be suffering from galloping anaemia. [sic]
>
> Regards,
> John."

The Committee report was not made public until a year after the Circuit Court decree had been entered; and Wards had no opportunity to reopen the case.

Now the Board's counsel argues to this Court that the Board's findings in the present case should go unchallenged because they are supported by the assumed truth of charges of discrimination made in another case, which the Board continued to prosecute after its repre-

sentatives had ceased to believe in the truth of the charges. The Board's arguments to this Court evidence prejudice, a lack of good faith, and a complete disregard of justice and fair play.

VI.

If This Court Agrees With Any One of the Contentions So Far Advanced in This Brief, the Case Should be Remanded Since a Material Error Has Been Committed.

So far, this brief has dealt with errors of law which call for a remand so that the Board may reappraise the evidence under a correct view of the law and facts, even though the record may have contained some evidence which would support the Board's conclusions. The sufficiency of these errors to require a remand thus does not depend upon Wards' ability to convince this Court that no substantial evidence whatsoever of an unfair labor practice appears in the record. This Court does not even have to agree with every one of the contentions advanced so far in this brief before ordering a remand. All of the several points discussed raise questions of law which were material to the Board's ultimate decision; if Wards' contentions as to any one of them be upheld, the Board committed a material error.

If a trial court improperly instructs a jury as to the nature of the offense sought to be proved, material error is committed; when the findings of an administrative agency do not clearly disclose that the nature of the offense has been correctly conceived by the agency, the doubt raised is on a material point, and, on the principle of the cases cited under Proposition I, the case must be remanded. So too, when the agency has "rested heavily" upon findings which have "inadequate" support, the error is a material one definitely affecting the final result.

The errors which have been discussed involve either a misconception of the nature of the offense charged, or are errors of fact stated in the Board's "concluding findings" as distinct from the Board's narrative recitation of the history of the case. They are thus material errors, any one of which calls for a remand of the case.

VII.

In Addition to the Errors of Law Already Discussed, the Utter Absence of Any Substantial Evidence of a Failure to Bargain Demands That the Board's Decision and Order Be Set Aside and Denied Enforcement.

Ward's Brief as Petitioner acted on the assumption that the Board's ultimate conclusion as to Wards' supposed failure to bargain rested directly on the so-called "concluding findings" of the Board. These "findings" were then fully analyzed to show that not a single one was based on factual proof substantially supporting them (Wards' Brief as Petitioner, pp. 41-63).

Propositions II through VI advanced in this brief show that the Board committed many grave errors of law in reaching its decision. As a result of these errors, many of the "concluding findings" upon which the Board based its conclusions do not as a matter of law or logic support those conclusions. In fact, of the nine "respects" in which the Board charged that Wards failed to bargain, the errors already discussed dispose of seven. We now propose to show that the two remaining findings equally lack support in the record, without repeating the lengthy analysis set forth in Proposition III of Wards' Brief as Petitioner.

A. The reference in the Board's brief to the prior charges at Portland shows how justified Wards was in rejecting the proposed clause against anti-union discrimination.

The previous proceeding at Portland charged Wards with wrongfully discharging fifty-one employees (9 NLRB 538 at p. 540). The Board upheld these charges as to twenty-three employees, and the Circuit Court found just enough evidence to support an inference as to twenty-one. (*Montgomery Ward & Co.* v. *NLRB,* (7th cir.), 107 Fed. (2d) 555).

The revelations of the Smith Committee show why Wards may well have thought the charges unfounded even though sustained in part by the Circuit Court of Appeals.

Not a single item of evidence in the present case suggests that Wards had discriminated against any employees because of union activity. Nevertheless, in accordance with customary union tactics, vague, unproved and unfair charges to this effect had been made in the union publication, the American Labor Citizen (Wards' Ex. 2, R. pp. 226-230, at pp. 228 and 229).

For Wards to acquiesce in the union demand that Wards promise not to discriminate would in the eyes of many employees imply a confession of guilt and an admission of the truth of the utterly unfounded union charges. To charge a man with the commission of a crime, and then to request him to promise not to commit such a crime in the future is to ask him to condemn himself.

The Unions' request was made for an obviously false reason: "a lot of the Union members did not know of a similar provision in the Wagner Act" (R. 765). The absurdity of the asserted reason is emphasized by the fact that Wards had been compelled to post a cease and desist

notice as a result of the decree of the Circuit Court of Appeals entered less than a year earlier.

Wards had the right to reject with indignation the Union request that it promise not to discriminate. Yet this refusal is one of the reasons most emphasized by the Board as justifying its holding that Wards failed to bargain.

B. If the Board was entitled, as its counsel argue, to refer to other proceedings involving Wards, the Board would have had conclusive evidence that Wards had no policy against signing labor contracts.

The Board's brief refers (p. 6, footnote 6) to evidence in the previous proceeding that Wards had a "long established policy to enter into no business agreement with any outside organization". Board's counsel argue that Powell's statements during the Portland negotiations "make it clear that respondent's 'long-established policy' in 1936 was still in effect in 1940".

The complete absence of fairness in this argument is demonstrated by the fact that the Board itself has found exactly to the contrary in a third proceeding involving Wards.

In a decision and order dated February 26, 1942, (39 NLRB No. 41) the Board found that:

> "The respondent at its Schwinn Warehouse, Chicago, Illinois, has not engaged in unfair labor practices within the meaning of Section 8 (1) or 8 (5) of the Act."

The Board had reviewed bargaining sessions conducted at Chicago on behalf of Wards by Barr, the same man who was found by the Board in the present case to be "the respondent's official in charge of labor relations and collective bargaining for all the stores and mail order houses" (R. 34). These negotiations were carried on at the same time as those involving Portland.

The Board found as follows with respect to a bargaining session held October 3, 1940:

> "During the course of the discussion, Wolchok asked Barr 'whether or not the company would sign a contract with the union and enter into a contract with the union'. Barr replied: 'We will sign anything on which we will agree * * * On any of these questions which * * * we are in agreement on we are prepared to enter into a contract with the Union."

Acting under Barr's instructions in the present case, Powell told the Unions that Wards "'possibly' might sign a contract" (R. 59), but did not promise that a contract would be signed as the question was premature before "we could reach an agreement upon substantial provisions" (R. 59). No inference of an intention never to sign an agreement could possibly be drawn from this statement of Powell's, especially when read in the light of Barr's promise to sign in contemporary negotiations where agreement had in fact been reached on substantial points.

The Board's decision omits to report, and the Board's brief neglects to inform this Court that Wards published a newspaper notice in Portland stating its willingness to sign a contract whenever agreement was reached (Wards' Ex. 11, R. 651).

When counsel for the Board call the attention of this Court to the facts of a proceeding relating to events four years prior to the ones in issue, but fail to call the attention of this Court to the facts of another proceeding covering contemporaneous events, and to other facts appearing in the present record, counsel have been unfair both to Wards and to this Court.

VIII.

The Board's Brief Demonstrates the Weakness of the Board's Case by Completely Misstating the Facts, And, in Its Effort to Justify the Board's Findings, by Relying Upon Supposed Facts Which the Board Itself Did Not Find.

Procedural due process requires that an administrative agency make known through some species of findings the basic facts upon which its conclusions are based. The form of such findings is not material; but, formally or informally, in numbered paragraphs or in narrative form or in some manner, the findings must be made.

The conclusions of the administrative agency must be supported by these findings. An absence of such findings cannot be supplied by counsel in the course of argument. Nor can counsel properly justify an order by arguing that it is supported by facts which the agency might have found, but did not.

The following list of the statements of purported facts to be found in the Board's brief but which the Board did not mention in its findings or which are demonstrably untrue will show that Board's counsel had great difficulty in supporting the Board's conclusions by an analysis limited to the facts found by the Board or evidenced in the record.

1. "Powell * * * refused even to agree to those demands which involved the making of no concession to the Unions, such as the recognition and no-discrimination clause." (Board's brief, p. 21)

To the extent that this implies that Powell refused to agree to other demands involving no concession, it is a clear untruth. The record does not show a single other

instance where Wards refused to agree to a demand embodying only the *status quo*. We need not here repeat the reasons for Wards' position as to recognition and discrimination.

2. "Respondent's * * * refusal to bind itself to recognize the Unions and its refusal to agree to other concededly reasonable proposals * * * fully warranted the Board in its finding." (Board's brief, p. 24)
3. "Respondent's refusal to agree to concededly reasonable proposals". (Board's brief, p. 26)
4. "In view of respondent's * * * failure to agree to concededly reasonable proposals * * *." (Board's brief, p. 34)

Wards strenuously denies that it refused to agree to any "concededly reasonable" demand. Wards does not concede that any Union demand which it refused was reasonable, especially the demand that it promise rather than recite recognition, and the demand that it promise not to discriminate.

These passages show that Board's counsel reflect the Board's belief that it had the right to pass on the reasonableness of terms on which Wards insisted.

5. "Barr gave express, written orders to his negotiator, Powell, not to * * * 'agree' to matters even though there was no dispute as to them." (Board's brief, p. 32)

This is a typical half-truth that gives an impression exactly the opposite of the truth. Barr instructed Powell:

> "In discussing individual clauses, state that you have no present objection to clauses which are not objectionable, but do not 'agree' to such clauses. You can only agree to a contract as a whole." (R. 735)

The statement in the Board's brief reads as if Powell had been instructed not to enter into a contract even on acceptable terms. The fact is that Powell was told that he could contract, but should not do it piecemeal. The statement in the Board's brief thus completely misrepresents the evidence.

6. "Powell was then asked if respondent would be willing to sign an agreement which merely set out its present policies and practices. He replied, so the union representatives uniformly testified, 'No'." (Board's brief, pp. 19-20)

7. "Nor would respondent even agree to enter into an agreement providing simply for the continuation of the existing hours and conditions of employment." (Board's brief, p. 31)

8. "Further, in refusing to embody the existing terms and conditions of employment in a binding agreement when the Unions asked whether it would do so, respondent undeniably established its lack of good faith." (Board's brief, p. 33)

9. "If the employer finds himself unpersuaded * * * the very least he must do, when request is made, is to offer to enter into an agreement providing for the maintenance of the status quo. Respondent was not even willing to do this." (Board's brief, p. 33)

10. "In view of respondent's * * * failure * * * even to agree to a contract providing for the continuation of existing terms and conditions of employment * * *." (Board's brief, p. 34)

These statements are absolutely contrary to the facts and to the Board's own findings.

The Board's brief gives two record citations to the assertion that Powell "replied, so the union representatives uniformly testified, 'No'." These citations, R. 175

and 452, are to the testimony of Board's witnesses Estabrook and Allen. Estabrook testified (R. 175) that either witness Langford or witness Allen asked Powell "Will you sign an agreement * * * with the same wages, hours, and working conditions as of the day before the strike" and that Powell answered in the negative. Allen later testified (R. 452) that he was the one who asked the question. On cross-examination he admitted that, when Powell "inquired if we were submitting that as a proposal", he either answered or would have answered that the unions were not doing so (R. 457). He did not deny that Powell had answered his question simply by saying that "the form of the agreement should be postponed until after the contents of the agreement had been decided upon" (R. 456).

The Board itself credited Powell with saying:

> "I replied that the question of the form of agreement, that is, whether it should be verbal or written, is premature at this time." (R. 51)

The true facts are:

first, that the unions never offered to contract on the basis of the *status quo;* (R. 247)

second, that the question was a hypothetical one asked for purposes of entrapment after the unions had filed charges that Wards had failed to bargain (R. 274-277);

third, that Wards did not refuse any request, bona fide or otherwise, to sign a contract on the basis of the *status quo;* and

fourth, that Wards simply answered a hypothetical question by the comment that it was "premature". (R. 51-52)

Counsel have not been helpful to this Court in representing as fact an interpretation of the evidence which the Board itself rejected.

11. "Receding from their principal demands, that is, for a union shop, a seniority rule, and an arbitration clause, the Unions asked respondent literally to write its own contracts with them, but to no avail." (Board's brief, p. 36)

This carries the previous misstatements to a new high. The Board itself found that at the end of the last conference

> "Ashe stated that the clauses of the contracts to which the respondent objected primarily were those providing for any union shop, any increase in wages, a seniority rule, or any form of arbitration, and stated further: 'We aren't getting any place; we might as well call it quits'." (R. 54)

How absurd this comment would have been if the Unions had in fact receded from their principal demands.

12. "Powell * * * stated that it would serve no useful purpose for respondent to do so unless respondent could be assured that the terms would be agreeable to the Union — in other words, that the Company proposals would not be subject to any negotiations." (Board's brief, p. 11)

The Board did not find, and the record does not disclose any statement that the terms offered by Wards would not be subject to negotiation. The insistence of Powell was simply that so far as possible the negotiations precede rather than follow the formal reduction of terms to a written proposal.

13. "Respondent's * * * insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining * * * " (Board's brief, p. 24)

14. "Respondent's insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining" (Board's brief, p. 29)

15. "In view of respondent's * * * insistence upon determining unilaterally matters which are legitimate subjects of collection [sic] bargaining * * * " (Board's brief, pp. 34-35)

No record reference is given for the first and third statements, but the second appears as a section heading. Under it, the brief discusses Powell's rejection of union demands for concessions as inconsistent with "company policy", which, the Board's brief adds, "was a fixed and inflexible matter and not to be bargained about" (Board's brief, p. 29). The assertion that Wards' policy was "not to be bargained about" is palpably untrue in view of the undisputed fact that Wards fully discussed its practice and policy in the course of negotiations and even offered to modify it by certain concessions. The assertion is the false conclusion of Board's counsel, and does not appear in the Board's findings.

The section also quotes two statements by Powell which are not referred to in the Board's findings. The first was that "the ultimate decision in matters affecting the hiring and discharge of employees and matters generally affecting the operation of the business should remain in the management of the company" (R. 829). This statement was proper, and shows that Wards did not only explain its policy but also explained the reasons for it. Wards had the legal right to determine unilaterally the terms of employment on which it would insist, so long as it did not refuse to bind itself to the establishment of such

terms. No provision of the law compels an employer to contract away the rights to decide whom he will hire or discharge, so long as he otherwise obeys the law. If Powell's statement be legally incorrect, then an employer has been deprived of the right to refuse to grant a closed shop.

Powell's supposed other statement that Wards "were the ones to decide whether the employees should have more money" (R. 373) was ascribed to him by a union witness, Dixon (Footnote 7). If made, the statement was proper, since it was simply the preface to a denial of a wage increase (R. 374). An employer has the legal right to decide what wages he will pay; and the assertion of this right is in no way inconsistent with the duty to incorporate such wages if mutually agreeable in a labor contract.

The Board did not find, nor does the record support, any conclusion that Wards insisted upon the retention of freedom of unilateral action on any "legitimate subject of collective bargaining". Board's counsel are here offering a new but equally insubstantial theory to support a conclusion which the Board drew under a different theory.

16. "Powell again rejected the Union's demand for additional compensation for working supervisors upon the admittedly false ground that they did not employ such persons." (Board's brief, p. 22)

Ward certainly does not "admit" that Powell rejected any demand on a "false ground". The demand was for extra compensation for "a working foreman, forelady, supervisor, or instructor" (R. 557). Powell, according to Estabrook's testimony as to the November 12 meeting, "didn't like the idea of having in there some of the clas-

7. The Board made no finding as to the truth of Dixon's testimony. Dixon was generally a confusing, inaccurate, and unconvincing witness. Here, again, Board's counsel has felt free to assert as facts debatable testimony as to which the Board itself made no finding.

sifications that we put in there", and stated that Wards "didn't classify its employees as such" (R. 252). The Board admits that Powell then offered a 3 cents an hour differential for working supervisors (R. 54). Powell reported to Barr that Wards did have "working supervisors" on its payroll (R. 739, 54); but the record does not show that Wards employed foremen, foreladies, or instructors. On December 17, Powell rejected this clause for the following reasons:

> "We objected to Article 6 on the ground we did not believe we employed persons such as those mentioned. Also, we inquired whether the second sentence of Article 1 did not eliminate such persons from the jurisdiction of the Union. Also, we stated we could not grant any concessions in the rate of pay of these people." (R. 764, 765)

Of Powell's three reasons for rejecting the union demand, the first had reference to the undisputed fact that Wards did not employ all the "persons such as those mentioned". Powell, having admitted the employment of supervisors on November 12, would not have been so foolish as to deny their existence a month later. Powell's point was not misunderstood; the Board's witnesses do not mention the supposed discrepancy between Powell's position on November 12 and that taken on December 17. Both the Board (R. 67) and the Board's brief misrepresent the facts.

17. "Although the Unions insisted upon receiving a prompt answer, * * * Powell put them off, agreeing to give them an answer in three days (R. 289). Thereupon the union representatives expressed the view that they 'were being stalled' (R. 161-162)." (Board's brief, p. 13)

The unions expressed the factitious opinion that they were "being stalled" at the beginning of the November 25 meeting, and not as a result of Powell's three-day delay for confirmation of a meeting from Chicago. This is

shown by the record reference to which the Board's brief itself refers (R. 161-162).

18. "The strike, called as it was * * * at a time when their request for a further meeting had been ignored for several days, was caused * * * by respondent's refusal to bargain collectively." (Board's brief, pp. 35-36)

No union request for a further meeting was ever "ignored" by Wards. The Board itself found that "Dixon offered, however, to permit negotiations to be carried on at Oakland if it were impossible for the respondent to send a representative to Portland" (R. 49). This was on December 5, as a result of a call from Wards' local manager in response to Dixon's call on the previous day.

On December 6th, Powell met at Oakland with White, who as the Board found "assured Powell that since they were making progress in their Oakland negotiations he would see that no strike action was taken at Portland" (R. 49). Yet the Portland strike began December 7th (R. 49).

To say that Wards had for "several days" before the strike "ignored" the request of Dixon for a meeting, to imply that by so doing Wards "refused to bargain collectively", and to allege this as the cause of the Portland strike, is to scrap the Board's own findings as well as to defy the record.

CONCLUSION.

The Board's decision and order in the present case employed nearly every device available to an administrative agency which seeks to proceed in an arbitrary fashion untrammeled by the traditional concepts of fair play and justice. The Board misconstrued the law. The Board attempted to usurp powers which Congress never intended to grant it. The Board sought to disguise the exercise of

a managerial authority over Wards' affairs by concealing the true purport of its decision. The Board misstated the facts. The Board went outside the record in its attempt to find an excuse for condemning Wards. The Board treated the mere holding of an opinion as to the nature of the duty to bargain with which the Board disagreed as an offense in itself. The Board disregarded undisputed evidence when it was embarrassing to the Board's argument. The Board drew inferences from facts which did not begin to support them. The Board employed adjectives and innuendo which no fair-minded reader of the record could excuse.

But counsel for the Board have gone even further. They have attempted to support the Board's findings by misstating the purport of the authorities they cite. They have attempted to urge upon this Court supposed facts not to be found in the Board's own findings. They have misstated the facts many times. They have attempted to prejudice this Court by reference to matters never introduced into evidence. They have concealed facts from this Court the knowledge of which emphasizes the impropriety of the arguments advanced outside of the record.

This behavior of the Board, and this conduct of Board's counsel, provide the proof, if proof be needed, that the best of laws may become an excuse for arbitrary and tyrannical conduct, and that judicial review of administrative abuses is an essential safeguard of the rights of a free people.

Respectfully submitted,

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